FILED

JUN 13 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF THOUSAND OAKS; COUNTY OF VENTURA,

Plaintiffs - Appellees,

v.

VERIZON MEDIA VENTURES, INC., dba Verizon Americast, Inc.; DOES 1 THROUGH 100, inclusive,

Defendants,

and

ADELPHIA CALIFORNIA CABLEVISION, LLC; ADELPHIA COMMUNICATIONS CORPORATION,

Defendants - Appellants.

No. 02-55798

D.C. No. CV-02-02553-ABC

MEMORANDUM*

CITY OF THOUSAND OAKS; COUNTY OF VENTURA,

Plaintiffs - Appellees,

No. 02-55816

D.C. No. CV-02-02553-ABC

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

v.

VERIZON MEDIA VENTURES, INC., dba Verizon Americast, Inc.,

Defendant - Appellant,

and

ADELPHIA CALIFORNIA CABLEVISION, LLC; ADELPHIA COMMUNICATIONS CORPORATION; DOES 1 THROUGH 100, inclusive,

Defendants.

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted January 16, 2003
Pasadena, California

Before: **HALL**, **KOZINSKI** and **RAWLINSON**, Circuit Judges.

The district court abused its discretion in enjoining the asset purchase transaction. Section 4.1 of the franchise ordinance covers only sale of a "[f]ranchise" or "rights or obligations . . . under the [f]ranchise." A franchise is a permit to operate a cable system. 47 U.S.C. § 522(9). The term "franchise" in section 4.1 therefore does not encompass cable system assets other than the permit

itself. The City and County do not contend that the asset purchase agreement purported to effect a transfer of Verizon's permit. Had it done so, the district court could have enjoined at most that specific aspect of the transaction.

The transfer of "franchise fees . . . arising out of or attributable to the ownership of the Acquired Assets on or after the Closing Date" did not violate section 4.1's restriction on transfer of "rights or obligations . . . under the [f]ranchise." Franchise fees accruing on or after the closing date necessarily arise under Adelphia's franchise, not Verizon's; the provision did not transfer a liability arising under Verizon's franchise to Adelphia; it merely ensured that Verizon would not be liable for fees arising under Adelphia's franchise.

The various other assets and liabilities transferred, such as bulk customer agreements and advertising agreements, are not "rights or obligations . . . under the [f]ranchise." They are assets and liabilities of a business authorized by the franchise, but they are not rights or obligations that the franchise itself grants or imposes.

The asset purchase transaction was not an "arrangement for the management of the [cable] system" under section 4.11. Sale of an asset is not, in normal commercial parlance, an "arrangement for the management of" that asset. A sale is an arrangement for the ownership of an asset; any change in management is an

incidental byproduct of the change in ownership. In other words, a sale is not an "arrangement for the management of" an asset because management is not the arrangement's object. The asset purchase agreement therefore did not violate section 4.11.

Appellees waived their argument that the transaction violated section 4.2 by failing to raise it as an alternative ground for affirmance in their opening brief on appeal. See United States v. Alexander, 287 F.3d 811, 817 n.2 (9th Cir. 2002).[1]

Finally, the transaction was not an artifice to evade the Ordinance's restrictions. Our literal construction of the Ordinance does not produce absurd results, because transfer of a cable system to an entity that already holds a franchise raises fewer regulatory concerns than transfer to an entity that does not.

REVERSED.

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[1] We respectfully disagree with the dissent's claim that the district court relied on this theory. The quoted language is from a discussion of whether the asset sale was an "arrangement for the management of the system" in violation of section 4.11, not a change of control of the Grantee in violation of section 4.2. Moreover, that plaintiffs alleged this theory in their complaint does not excuse their waiver on appeal.